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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

17 JOHN PELS, on behalf of himself
and all others similarly situated,

Case No. 3:19-cv-03052-SI

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE**

Plaintiff

V.

KEURIG DR. PEPPER INC

Date: October 18, 2019
Time: 10:00 a.m.
Courtroom: 1, 17th Floor
Judge: Hon. Susan Illston

Defendant.

Defendant.

1 Plaintiff John Pels (“Plaintiff”) hereby respectfully responds to Defendant’s Request for
 2 Judicial Notice as follows:

3 **A. Exhibit A May Be Judicially Noticed**

4 Exhibit A to the Declaration of Charles C. Sipos (“Sipos Dec.”), dated July 26, 2019, is a
 5 Peñafiel Mineral Spring Water label, which Plaintiff believes is typical of the labels attached to that
 6 product during the times he purchased. As this label is not subject to reasonable dispute, Plaintiff
 7 does not oppose judicial notice. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th
 8 Cir. 2018).

9 **B. Exhibit B May Be Judicially Noticed in Part**

10 Exhibit B to the Sipos Dec. is an article published by *Consumer Reports*, placed on its
 11 website on or about June 28, 2019.¹ Plaintiff cited an earlier version of this article, dated April 18,
 12 2019, in his Amended Class Action Complaint (“Complaint” or “Cplt.”). *See* Cplt. ¶ 23.

13 The *Consumer Reports* article may be noticed for the purpose of acknowledging that certain
 14 matters were duly reported,² such as that *Consumer Reports* and prior regulatory testing showed
 15 Peñafiel arsenic levels to be well in excess of federal limits, that this situation has existed for many
 16 years, that Keurig conceded its own testing showed violative arsenic levels, and that the Center for
 17 Environmental Health likewise found Peñafiel to be unlawfully marketed. *See* Jonckheer Decl., Ex.
 18 C, pp. 1-5, 7-8, 18.

19 Keurig, however, improperly attempts to use the article to dispute facts stated in the
 20 Complaint, to promote falsehoods, and to conceal its own admissions. For example, in recounting
 21 the facts of this case, Keurig told *Consumer Reports* (and *Consumer Reports* reported) that Keurig’s
 22 own “recent” testing showed arsenic levels that were “slightly” elevated. Def’s Br. at 3. This is not
 23 what the article reports. Instead, it reveals that Keurig’s testing “**confirmed levels above the federal**
 24 **limit, an average of 17 ppb [parts per billion].**”³ (emphasis added). Keurig then argues that—even
 25 though its results and the *Consumer Reports* results came to the same exact conclusion regarding

26
 27 ¹ Plaintiff resubmitted the article with numbered pages to enable easier citation. *See* Jonckheer
 Decl., Ex. C.

28 ² *Brodsky v. Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111-12 (N.D. Cal. 2009)

³ The federal limit is 10 ppb.

1 arsenic levels—that *Consumer Reports* could not have used an accurate methodology (nor could
 2 Plaintiff have reasonably relied on its findings). *See* Def's Br. at 8, 18.

3 Keurig cannot use the judicial notice doctrine to submit a document for the purpose of
 4 arguing with that document, disputing its conclusions, or misrepresenting it. *See Khoja*, 899 F.3d at
 5 998-99 (barring the “unscrupulous use of extrinsic documents to resolve competing theories against
 6 the complaint”). Whatever quarrels Keurig may have with *Consumer Reports* are for another day.
 7 *See Smith v. Flagstar Bank, FSB*, No. C 18-05131 WHA, 2019 U.S. Dist. LEXIS 24457, at *7-8
 8 (N.D. Cal. Feb. 14, 2019) (document will only be noticed if the matters proponent cited are “beyond
 9 reasonable dispute”).

10 **C. Exhibit C May Be Judicially Noticed in Part**

11 Ex. C to the Sipos Dec. is Keurig’s own June 21, 2019 press release entitled, “Keurig Dr
 12 Pepper Announces Voluntary Withdrawal of Unflavored Peñafiel Mineral Spring Water that Does
 13 Not Meet FDA Bottled Water Quality Standards.”

14 This exhibit may be judicially noticed to the extent it contains *factual* admissions by Keurig.
 15 *See, e.g., Hernandez v. Wells Fargo & Co.*, No. C 18-07354 WHA, 2019 U.S. Dist. LEXIS 114817,
 16 at *15 (N.D. Cal. July 10, 2019) (“party admissions” contained within a document authored by a
 17 defendant may be noticed); *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965-66 (C.D. Cal.
 18 2005) (taking judicial notice of admissions on a website associated with a witness). *See also*
 19 *Libertad v. Welch*, 53 F.3d 428, 443 n.12 (1st Cir. 1995) (“The press release is not hearsay, but
 20 admissible evidence as an admission of a party-opponent under Fed. R. Evid. 801(d)(2)(A).”).

21 Ex. C contains several factual admissions, including: (1) that unflavored Peñafiel Mineral
 22 Spring Water does not meet FDA bottled water quality standards; (2) that a recall was announced
 23 due to the “presence of violative levels of arsenic”; (3) that a full refund was offered only to those
 24 consumers that had bottles in their possession; and (4) that the high arsenic levels were verified by
 25 Keurig through independent lab testing.

26 The press release also has several unascertainable statements of fact that are not appropriate
 27 for judicial notice. These are: (1) that Keurig’s aquifer levels of arsenic vary over time; (2) that
 28

1 Keurig installed enhanced filtration systems; and (3) that the product is now being produced well
2 within regulatory guidelines.

3 The press release also contains an *opinion* that is not proper for judicial notice—i.e., that
4 arsenic is only associated with chronic diseases at levels “well above those detected.” Plaintiff will,
5 in the course of this litigation, vigorously dispute this opinion. Thus, this portion of Ex. C should be
6 not be taken as true, as judicial notice is limited to facts. *Rollins v. Dignity Health*, 338 F. Supp. 3d
7 1025, 1032 (N.D. Cal. 2018).

8 **CONCLUSION**

9 For the reasons stated above, defendant’s Request for Judicial Notice should be granted in
10 part and denied in part.

11
12 DATED: September 9, 2019

SCHUBERT JONCKHEER & KOLBE LLP

13 By: /s/ Robert C. Schubert
14 Robert C. Schubert

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